
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY,
a Corporation,

Appellant,

vs.

LaVERL JOHNSON and JOLEEN JOHNSON,
husband and wife, and PACIFIC FRUIT EXPRESS
COMPANY, a Corporation,

Appellees.

Petition for Rehearing and Brief

TO HONORABLE ALBERT LEE STEPHENS,
HONORABLE JAMES ALGER FEE, AND
HONORABLE RICHARD H. CHAMBERS,
CIRCUIT JUDGES OF THE ABOVE ENTITLED
COURT

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PETITION FOR REHEARING

LaVerl Johnson and Joleen Johnson, husband and wife, Appellees, respectfully petition this Honorable Court for a rehearing of the Appeal in the above entitled cause, and in support of this Petition, represent to the Court as follows:

We reserve our argued position as presented by the Appellees in the original hearing, but in this Petition address ourselves solely to features of the Decision wherein we believe the Court may be convinced its result is based upon the application of incorrect legal principles.

This Petition is devoted to convincing this Court that it has erred in its determination of three major questions upon

which it bases its opinion and has announced in its printed opinion.

I.

The Court erred in holding at pages 3 and 4 of the printed Opinion that the electricity which injured the Appellee, LaVerl Johnson, was the electricity of the Pacific Fruit Express Company, and not the electricity of the Appellant, Union Pacific Railroad Company, and in ruling on such questions as a matter of law for the reason it disregards the evidence and the law and deprives Appellees of a jury trial, all as presented in the accompanying Brief.

II.

The Court erred in holding at page 4 of its printed opinion that,

“We think to overcome the contract arrangement and establish joint control of the station someone of substantial authority with Union Pacific would have to be connected up with some joint control activity.”

for the reason that such a holding by the Court wholly overlooks the joint use made by the Union Pacific Railroad Company and Pacific Fruit of the sub-station at the point where Appellee, Johnson, was injured and for the reason that such a ruling disregards the evidence and the law, and deprives the

appellees of a jury trial, all as discussed in the accompanying Brief.

III.

The Court erred in holding at pages 6 and 7 of the printed Opinion:

““We think there is no case that requires the vendor of electricity to require that his customer modernize his equipment to comply with improved safety developments when the equipment can be operated safely by the trained and safely by the untrained if properly cautioned”

for the reason such a ruling is not the law and disregards the evidence, all as discussed in the Brief.

IV.

The Court erred in ruling as a matter of law on all of the points hereinabove set forth for the reason that there was substantial evidence in the trial of said case upon which a jury would be fully justified in determining that the electricity which injured LaVerl Johnson was the electricity of the Union Pacific Railroad Company; that the Union Pacific Railroad Company was jointly using the sub-station with the Pacific Fruit Express Company for the purpose of delivering electrical energy in the amount of 2300 volts to the Pacific Fruit Express Company; and that the duty of care did exist in the particular facts and circumstances of

this case, as more fully discussed in the accompanying Brief.

V.

That the Court erred in its construction and interpretation of existing decisions in Idaho, in the 9th Circuit, and in other Circuits of the United States Courts respecting the duty of one handling and distributing electricity, all as more fully discussed in the Brief herewith submitted.

WHEREFORE, upon the foregoing grounds it is respectfully urged that this Petition for rehearing be granted and that the justices before whom this matter was submitted and argued on the original hearing grant a rehearing and grant a hearing en banc before a full Court of all of the Judges of the United States Court of Appeals, and that the Judgment of the United States District Court for the District of Idaho, Eastern Division, be, upon further consideration by this Court, affirmed as to these Petitioners.

Respectfully submitted,

George R. Phillips

Louis F. Racine, Jr.

B. W. Davis

CERTIFICATE OF COUNSEL

I, Louis F. Racine, Jr., of counsel for the above named

Petitioner, do hereby certify that the foregoing Petition for Rehearing of this cause is well founded and presented in good faith, and is not interposed for delay.

Louis F. Racine, Jr.

of Counsel for Appellees

BRIEF IN SUPPORT OF PETITION FOR REHEARING

In the presentation of this matter, we do not mean in any manner to be disrespectful. We believe ourselves to be sincere and correct in our position, and will try to be positive and emphatic in urging upon the Court the errors which we believe have been committed. The opinion of this Court discloses a tremendous intellectual difference of opinion between the Court and Counsel and we believe the Court has unjustly and unfairly taken from the Johnson's that to which they are entitled by a jury verdict following a proper trial and places property rights above human rights and personal rights.

The Brief will be presented under the individual grounds and numbered headings as set forth in the Petition.

I.

The Court has, by its Opinion at pages 3 and 4, determined that the Union Pacific Railroad Company had no control and dominion of the electricity and did not own the electricity which injured LaVerl Johnson, on the basis

that where the incoming electric wires went into the sub-station enclosure control and dominion passed from the Union Pacific Railroad Company to the Pacific Fruit Express Company. We believe that the evidence and the record and the law cannot fairly support a conclusion as made by the Court.

The Agreement, introduced in evidence by the Appellant as Exhibit 26, (Tr. pp. 314-320) provides (Tr. p. 315) that maintenance, repairs, renewals and changes in construction of the transformer station for the delivery of power at approximately 2300 volts shall be made by the Railroad Company at the cost and expense of the Pacific Company. The Agreement, likewise, (Tr. p. 316) provides that the Railroad Company will install and maintain at the expense of the Pacific Company, meters to measure the electric service, and will inspect such meters from time to time. The remaining portion of that Agreement provides as to the method of payment by the Pacific Company to the Railroad Company, the testing of meters, the correction of faulty meters, the definition of the error of a meter, the method of billing the Pacific Company for the power consumed by it. The record shows, without dispute, that the voltage running over the Union Pacific lines was in the amount of 12,500 volts, and that such a voltage ran into the sub-station (Tr. p. 281). The electricity which the Pacific Fruit Express undertook to receive from the Railroad Company, and for which the Railroad Company billed the Pacific Company was 2300 volts, not 12,500 volts (Ex. 26, Tr. p. 315). Johnson was injured by the 12,500 volts of electricity which ran over all

of the high-voltage lines of the Union Pacific Railroad Company of Pocatello, Idaho, and was not injured at a point on the Pacific Company side of the meter by the 2300 volts of electricity for which the Pacific Company was billed, and paid (Tr. pp. 162-163). An examination of the entire record shows no shred of evidence to the contrary. By deciding as a matter of law that the presumption is that the electricity injuring Johnson was that of the Pacific Fruit, the Court has decided the facts and supplanted its judgment for that of a jury, and disregarded the law.

The Court cites no cases but *Ohio Power Company vs. Beck*, Ohio, 199 NE 860, page 861 of the *Northeastern Reporter*, seems to us directly in point. There, the Court said:

“It is clear that the electric energy furnished was the property of the power company until it reached the meter beyond the tipple. There were mutual advantages to both contracting parties. By measuring this current within the plant, and closer to its point of consumption, the brick company was advantaged, in that the power company would bear the loss of current lost by groundage from the property line to the meter. On the other hand, the power company, without expense for line erection or maintenance within the brick company plant, had permissive use for transmission of its property.

“To say that a power company has no control over an appliance of another, which it in fact exclusively used for the conveyance of its own property, the commodity in this instance being a deadly agency, is to conclude that one may be excused from responsibility because another actually owns the property which it uses. It is certain that, when a bailee, gratui-

tous or otherwise, makes use of property potentially dangerous, or makes it so by the manner of his use, and thereby injures another, where the other has a legal right to be, he cannot be heard to say that he is not liable because another actually owns the property. We see no distinction in principle between the presented situation and suggested comparison.

“The power company had at least possessive control of this line up to the meter. If it turned a dangerous agency thereon, knowing of defects therein, or there were defects that it might have discovered upon reasonable examination, it is just as negligent because of the dangerous defect therein as if it actually owned the appliance. One is not entitled to notice of that which he is bound to know; but if notice was necessary, then we must conclude that the record contains sufficient facts thereof to sustain the jury’s verdict. The power company had, by virtue of its permissive and exclusive use of this line, a corresponding duty to perform, that is, to see to it that its commodity could be safely conducted over the property without injury to the employees of the brick company, who had a legal right to be in and about this line.”

It must be noted that the case above cited and quoted was one, as is this case, where the transmission of a deadly agency was made into and upon another’s property to a point where it had to be and was measured, stepped down, and made available for the consumer’s use. The Court in the above case made mention of the fact that the service contract between the power company and the brick company provided for a delivery of a certain voltage at the meter which meter was installed by the power company on the brick company property, and that the power company would have free ac-

cess to the premises for the purpose of examining, repairing, or removing meters or other appliances belonging to the power company. Exactly the same situation exists between the Railroad Company and the Pacific Company in the instant case.

The Ohio Court is not alone in its view of the matter of joint use of electrical facilities fixing a joint responsibility. The California Court in *Irelan-Yuba Gold Quartz Mining Co. vs. Pacific Gas and Electric Co.*, 116 Pac. 2d 611, held that a distributor of electrical energy, using the customer's lines and apparatus to deliver energy to the customer, is not relieved of responsibility of maintenance and use of ordinary and reasonable care, according to the danger of handling electricity, since the line and apparatus in such an instance is at least under joint control and joint use of the company and the customer. *Moseley vs. Garden City Irr. Power Co.*, Kan. 152 Pac. 2d, 799, and *Texas Electric Service Co. vs. Anderson*, Tex. 55 SW 2d 142, are illuminating cases on this matter of joint control and joint use. Despite these cases, and the rules announced by the cases, particularly the Ohio case, which rule would seem to be nothing more than good common sense, the Court has concluded that at the point where the wires went into the sub-station enclosure the Railroad Company no longer had dominion or control or any responsibility regarding the facilities carrying its 12,500 volts of electricity. Why there was any difference between that point and some other point up to the point where the electricity was metered and thereafter was distributed and used by the Pacific Company in its own facilities is not explained.

The Railroad Company and the Pacific Company under this reasoning might just as well have tied a rag on the line and agreed that point was the delivery point and beyond that point—even though the same amount of electricity was in the line, not yet metered, the Railroad responsibility ended. The Pacific Company could not and did not use the 12,500 volts of the Railroad's electricity, and did not have dominion over that electricity. The Pacific Company was interested in the electricity on its side of the transformer and the meter, and that fact is abundantly shown in that the Pacific Company did not pull the disconnects which would cut off the Railroad's 12,500 volts of electricity running into the lightning arresters which so horribly injured Johnson. The Pacific Company apparently didn't even have hot-sticks in the sub-station; again showing that it did not consider it had control or dominion over the disconnects because to operate those disconnects hot sticks are required to cut off the 12,500 volts running into the lightning arresters. The Pacific Company's concern was with the electricity which they could use and which they were paying for, and that was the 2300 volts and not the 12,500 volts which the Railroad Company ran over its lines to the points of transformers and meters where that amount was stepped down to the lower voltage for use by the Pacific Company.

II.

At page 4 of the printed Opinion of the Court, the Court concludes that the contract arrangement is such that the Pacific Fruit was obligated to maintain the station, although

it, from time to time, hired Union Pacific to do so, and occasionally someone else, and that as a consequence the contract arrangement controls and does not establish a joint control of the substation. Such a finding as a matter of law is an erroneous and unsound conclusion on the part of the Court and a positive invasion of the function of the jury. The exhibits, particularly Exhibit 26, clearly set forth that the Railroad shall "maintain, repair, make all renewals and changes in said construction, but at the cost and expense of the Pacific Company." In addition, that exhibit and the record show that the Railroad Company and the Pacific Company were jointly using the appliances, namely the lines and the sub-station, up to the point of the transformer and the meter, for the reason that the Railroad Company could not and did not charge for more than 2300 volts of electricity. The Pacific Company could not use more than 2300 volts of electricity, and could not receive and use the 12,500 volts of electricity going over the Railroad system, and into the sub-station to the transformers and meter. Exhibit 26 clearly recognizes the responsibility of the Railroad Company as a supplier of electricity where, in that Agreement the right is reserved to make the maintenance and repairs at the cost and expense of the Pacific Company. The record is replete with evidence which wholly justified the jury in finding a joint use; and time and again the Railroad Company was at the sub-station making repairs and doing maintenance work. Further, the Pacific Company did not have electricians on its payroll. The evidence justified the jury in determining that Union Pacific men were in the sub-station, working on

the very day in question (Tr. 134, 136). The evidence also justified the jury in determining that the Railroad Company would come at any time of the day or night to the Pacific Company sub-station to do any necessary work. The electrical foreman of the Union Pacific Railroad Company so testified. (Tr. 355).

The distributor of electrical energy has the duty of exercising the highest degree of care. Such a rule applies, not only in Idaho, but in most jurisdictions; and, the Idaho Court has seen fit to very positively announce such a rule in numerous Idaho cases, all as cited in our original Brief. The Ninth Circuit Court of Appeals, has, likewise, very definitely recognized such a rule. These cases, are cited in our original Brief, under heading "A", commencing at page 9, and continuing to page 40 of the argument. The Court has cited no decisions of its own, of the Idaho Court, or of any other jurisdiction in determining as a matter of law that the electricity was that of the Pacific Company, and in determining that there was no joint use of the facilities to the point where Johnson was injured. The Court simply by-passes the Idaho decisions, and the decision of the Ohio Court, the California Court and others, as above cited and quoted, by saying that the Union Pacific did not own the current or the appliances. In so doing, the Court violates the rule as laid down by the Supreme Court of the United States in *Erie Railroad Co. vs. Tompkins*, 304 U. S. 64. The Court, we believe, is not in as good a position to say what the Idaho law is and what the Idaho Court would hold, as the Trial Judge, with a lifetime of experience as a trial lawyer in Idaho.

The Court makes no reference to Exhibits 22, 23, 24 and 25, having to do with the National Electrical Code as adopted in Idaho, and the Idaho Minimum General Safety Standard Practices. In so doing the Court, again, fails to take cognizance of existing Idaho Law, rules and regulations.

Under the theory of ownership of the electricity and joint use, aside from any duties of care as referred to by the Court elsewhere in its Opinion, the jury had a right under the evidence to determine that the Railroad Company had not complied with the law in Idaho, the National Electric Code, the Idaho Minimum General Safety Standard Practices, and as a consequence was guilty of negligence which was a proximate cause of injury to Johnson. The adverse determination by this Court of the ownership of the electricity and the joint use substantially defeated the rights of Appellants. And was accomplished without reference to a single authority or precedent.

III.

After adversely determining the ownership of the electricity which injured Johnson, and the question of the use of the Pacific Company's line and facilities to carry the Railroad's 12,500 volts of electricity into the sub-station, where it could be transformed and metered for the use of the Pacific Fruit Company, the Court, at pages 6 and 7 of its opinion, was required to determine the duty of a distributor of electricity as to conditions existing in a customer's appliances. A determination of that duty was not at all necessary if there had been a proper determination of the matters discussed

under heading I and II of this Brief.

The decision cited by the Court, *Kelly vs. Duke Power Co.*, (4 Cir.) 97 F. 2d 529, cited at page 6 of the Opinion, in support of the Court's statement and ruling that there was no duty to Johnson, did not involve a question of notice and knowledge and the rule as to notice and knowledge was not even mentioned in the opinion. Thus, it is not authority for the statement, "Beyond that, we do not think the cases go." *Bristol Gas and Electric Co. vs. Deckard*, (6 Cir.) 10 F. 2d 66, is cited in support of the statement by the Court, page 6 of the Opinion, "that the duty exists when a known hazard arises from the owner's failure to maintain or repair or restore equipment to its original condition." The Bristol case was not one of restoring equipment to its original condition, but was one where the roof leaked, and the power company knew about it, although the electrical equipment, and the roof, and the line carrying the electricity to the customer's equipment were all owned and controlled by the customer; and the Court held that the power company had an obligation to require the brick company, the customer, to repair the leaky roof, or turn off the electricity, for the reason that the rain dropping on the electrical equipment would short the equipment and create a dangerous and hazardous condition. The roof was not a part of the electrical equipment.

The Court makes reference and analogy to a band saw and to an old-fashioned electric heater. Those analogies are hardly comparable to a high-voltage electric sub-station carrying 12,500 volts of deadly electricity. Nor is a home band-

saw or a home electric heater comparable to a sizable industry, such as the Railroad Company and the Pacific Fruit Company, handling large voltages of electricity for industrial, and not home use. Appellants Exhibit 28, Tr. pp 326-333, at page 330, recognizes that the Railroad Company and the Pacific Company in the use of the premises upon which the sub-station was located, but owned by the Railroad Company, had a duty to conform to laws, ordinances and other public regulations in effect, or to later be enacted. The National Electrical Code, and the Idaho Minimum General Safety Standard Practices refer to electrical sub-stations, and provide for safe industrial practices in the use and handling of electrical energy of high voltage. Surely, the Court must recognize a duty in such circumstances.

The Court rules there was no duty. The Court states there was no duty unless the distributor turns electricity into improperly installed electric wires, known to contain a possibility of fire if energized. The Court states perhaps there was a duty on the part of a distributor of electric energy where the customer fails to maintain or repair or restore equipment to its original condition. The Court, then holds that where, as in this case, the distributor handles over its own lines, high-voltage electricity, 12,500 volts to be exact, and sends that precise amount of voltage from its lines into lines and appliances owned by a customer, that the distributor's duty as to any common sense safety practices ends when the electricity leaves lines owned by the distributor. This ruling, the Court would say, applies even though the customer cannot and does not use the 12,500 volts. It applies

even though the distributor meters the electrical energy in on the customer's premises, and even though the electrical energy metered is stepped down from the distributor's 12,500 volts to 2300 volts which is the voltage that the customer can use. This ruling applies even though the customer is charged for 2300 volts, not 12,500 volts.

What happens to the experience of society as to safety practices over a period of years after the original installation of the electric appliances on the customer's premises? That, apparently, is of no concern to the Court. So long as the distributor does nothing more than require that a customer maintain and keep in repair his appliances as they were originally, and only for the purpose of conducting the electricity without the electricity escaping, the distributor has conformed to the Court's ruling. What happens to the well recognized rule in Idaho that one having such a destructive and mysterious force as electricity under and within their control must use "the highest degree of care known to man" is not announced by the Court. That such a duty does exist in Idaho, is apparent from the Idaho cases cited in the original Brief, announcing that such a duty is placed upon anyone handling and controlling and distributing electrical energy. This Court would say that notice to and knowledge of a distributor of electrical energy relative to dangerous and hazardous conditions involving the distribution of electrical energy existing on a customer's premises applies only in the restricted instances discussed above. The Court would restrict the duty to whether or not the appliance can safely receive the product and refuses to discuss or recognize safety

procedures laid down in the National Electrical Code, representing the experience of the electrical industry, and setting standards of care recognized as required to conform to safe practice in the industry, and designed to prevent the uninitiated from being injured. It is no answer to suggest that the "untrained" could safely handle high-voltage electricity "if properly cautioned" because of the very freakish nature of electricity. Well trained electricians cannot always predict what electricity will do. An intelligent electrician would not caution the "untrained" as to how to handle high-voltage electricity but would stay with such an "untrained person." This is recognized in the National Electrical Code and untrained persons in high-voltage electricity are not to go into a sub-station carrying high voltage without trained high-voltage electricians. The Railroad in this case had notice and knowledge that untrained persons were going into the sub-station and the jury had a right to determine on the basis of such evidence that the Railroad Company had been negligent in not requiring safe-guards in the sub-station under such circumstances. Particularly is this true because the unguarded lightning arresters, carrying the 12,500 volts of electricity of the Railroad Company were, in fact, used by the Railroad Company to drain and ground extra surges of electricity owned and distributed by it.

The Court recognizes in its Opinion that the Railroad Company, as a distributor, might well have foreseen that such an injury might occur. But the Court simply states that regardless of such a fact, and although the Railroad might have foreseen such an injury might occur and although the

Railroad Company was a distributor of electric energy, that it was under no obligation to do anything to prevent injury or death in the situation here, and under no obligation to itself conform to recognized standards of safety or to require the customer to conform to such standards.

Such a holding is not the law. The Court makes no reference to, nor attempts to discuss in any manner, the cases which have arisen between a distributor and a customer involving the right and the duty of a distributor to require customers to install new safety devices. Generally, those cases arise, not by reason of injury or death of persons or damage to property, but out of proceedings instituted by a customer to require the power company to turn the energy back into the customer's premises, and/or for damages arising from the shutting off of the energy. In *Alabama Power Co. vs. Henson*, Ala. 191 So. 379, the Court held that it is a right and may become a duty of an electric utility to require customers to install new devices. In *Wiegand vs. Alabama Power Co.*, Ala. 127 So. 206, at page 209, the Court said:

“* * * (It is the power company's) duty and right to adopt improved methods of instrumentalities intended for better protection, not only of property, but of human life as well. * * *”

In *Arkansas Power and Light Co. v. Abboud*, Ark. 164 SW 2d, 1000, the power company was held responsible for damages for breach of contract to a customer who relied on a supply of electricity where the power failed because of faulty conditions on another customer's premises. The Court

there reasoned that the power company had a duty of inspection as to the facilities on the other customer's premises in order that proper service could be assured to all other customers.

Many cases recognize that as the danger increases, the degree of care required is greater. Such cases are cited in the original Brief. However, in *Martin vs. Northern States Power Co.*, Minn. 72 NW 2d 867, the Court discussed the duty of care where electric wires carry strong and dangerous currents, and where the result of negligence may be an exposure to serious accident and damage; and there recognized that a very high degree of care is required. Certainly, far more than is necessary in so far as the use of a band saw or a small home heater.

IV.

This heading of the Petition has been discussed under the immediately preceding three points.

V.

We firmly believe that this Court has, by its decision, taken from Johnson a right to trial by jury. The Trial Court instructed, and the jury decided, on substantial evidence the very issues which this Court now rules upon as a matter of law. The Court rules upon such issues without the benefit of any citation or authority. The rule in Idaho, and the rule which, as we understand, also applies in the Federal

Court, possibly to even a greater degree, is that a Court has no right to take questions from the jury if there is any evidence upon which reasonable minds might differ as to the conclusions and inferences arising from such evidence.

The Supreme Court on April 9, 1956, in case number 282, Schulz vs. Pennsylvania Railroad Co., 100 L. ed. p. 430, an action under the Jones Act, said:

“* * * The Seventh Amendment to the Constitution provides that ‘the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise re-examined in any court of the United States than according to the rules of the common law.’ We granted certiorari to consider the failure of the district court to let this case go to the jury, 350 U. S. 882”. * * *

“In considering the scope of the issues entrusted to juries in cases like this, it must be borne in mind that negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre. But measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done, or of failing to do that which a person of reasonable prudence would have done under like circumstances. Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. ‘We think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as

others.' *Jones v. East Tennessee, V. & G. R. Co.*, 128 U. S. 443, 445 (1888). * * *

"* * * But the courts below took this case from the jury because of a possibility that Schulz might have fallen on a particular spot where there happened to be no ice, or that he might have fallen from the one boat that was partially illuminated by shore lights. Doubtless the jury could have so found (had the court allowed it to perform its function) but it would not have been compelled to draw such inferences. For 'the very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.' Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn."

In *Dunclick, Inc. vs. Utah-Idaho Concrete Pipe Co., et al.*, March 28, 1956, _____ *Ida.* _____, 295 P. 2d 700, the Idaho Court said once again:

"“This Court has frequently and uniformly held that findings made by the trier of facts, supported by substantial, competent, although conflicting evidence, will not be disturbed on appeal. *I. C.*, Sec. 13-219; *Lanning v. Sprague*, 71 *Ida.* 138, 227 P. 2d 347; *Williams v. Idaho Potato Starch Co.*, 73 *Ida.* 13, 245 P. 2d 1045; *Summers v. Martin*, 77 *Ida.* _____, p. 2d _____.”

There have been many announcements as to the inviolability of our system of juries as fact finding bodies. Mr. Justice Storey, former Justice of the United States Su-

preme Court, a learned jurist, in his book "Storey on Constitution", page 1779, expressed himself as follows:

"* * * the Constitution would have been justly obnoxious if it had not confirmed it (right to trial by jury) in the most solemn terms."

Associate Justice Sutherland of the Supreme Court of the United States, in *Dimick vs. Schmidt*, 293 U. S. 474, 485, said:

"Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment should be scrutinized with the utmost care".

CONCLUSION

The Court has considered this case to be a "hard case" and one which "brings us no pleasure or happiness". Having so stated we entrust to the Court the task of once again carefully considering the evidence in this case and the decisions cited by the Johnsons in their original Brief, as well as the decisions cited in this Petition and Brief on Rehearing; and we most respectfully and sincerely believe that the Court upon a re-examination of its decision will withdraw its previous opinion and affirm the judgment of the Trial Court.

Respectfully submitted,

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Louis F. Racine, Jr.

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Attorneys for Petitioners.